

Tran (Migration) [2018] AATA 4903 (25 October 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Ms Ngoc Binh Tran
VISA APPLICANT:	Mr Quang Minh VO
CASE NUMBER:	1617956
DIBP REFERENCE(S):	OSF2015/071169
MEMBER:	Helen Kroger
DATE:	25 October 2018
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa: • cl.300.215 of Schedule 2 to the Regulations • cl.300.216 of Schedule 2 to the Regulations • cl.300.221 of Schedule 2 to the Regulations

Statement made on 25 October 2018 at 12:49pm

CATCHWORDS

MIGRATION – Prospective Marriage (Temporary) (Class TO) – Subclass 300 (Prospective Marriage) – genuine and continuing relationship – plans to marry in Australia – financial aspects – modest income – shared expenses on holidays together – commitment to each other – live apart in separate countries – extended care and support to their respective families – decision under review remitted for reconsideration

LEGISLATION

Marriage Act 1961 (Cth) s 65

Migration Regulations 1994 (Cth) Schedule 2 cls 300.215, 300.216, 300.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the visa applicant a Prospective Marriage (Temporary) (Class TO) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 4 September 2015. At the time the visa application was lodged, Class TO contained only one subclass: Subclass 300 (Prospective Marriage). The criteria for a Subclass 300 visa are set out in Part 300 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on 30 August 2016 on the basis that the visa applicant did not satisfy cl.300.215, cl.300.216 and cl.300.221 of Schedule 2 to the Regulations because the delegate found that the parties have not been, nor intend to be in a genuine and continuing relationship.
4. The review applicant appeared before the Tribunal on 24 October 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant via telephone, who is based in Vietnam, the review applicant's daughter, and the niece of the visa applicant. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
5. The review applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration

7. CONSIDERATION OF CLAIMS AND EVIDENCE

Do the parties genuinely intend to marry?

8. Clause 300.215 requires that at the time of application the parties have a genuine intention to marry, and that the marriage is intended to take place within the visa period.
9. The parties held an engagement party on the 3 February 2014 in Vietnam that was organised by the "uncle"/friend of the applicant who is also a friend of the sponsor's family. The parties invited around 50 family and friends to join them. The Tribunal has considered this event and given that it is not the first marriage for either party, has considered the inclusion of the family members. The applicant's daughter flew to Vietnam with her mother to attend the occasion. The applicant provided evidence of their intention to marry to the delegate in the form of a status certificate accompanied by correspondence from an authorised marriage celebrant.
10. At hearing, the parties explained that they will get married in Australia, should the prospective marriage visa be granted. Whilst they have not set a date, the Tribunal has considered their consistent and candid explanation given at hearing, and is satisfied that at the time of the visa application and at the time of decision, the parties intended to marry within the visa period and will do so within the visa period.

11. Therefore they meet the requirements of cl.300.215(a) and cl.300.215(b)

12. Do the parties genuinely intend to live together?

13. Clause 300.216 requires that at the time of application 'the parties genuinely intend to live together as spouses'. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where those two people are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is recognised as valid for the purposes of the Act; there must be a mutual commitment to a shared life as a married couple to the exclusion of all others; the relationship must be genuine and continuing; and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In considering an application for a Prospective Marriage (Temporary) (Class TO) visa, the Tribunal may have regard to the considerations set out in r.1.15A(3) for spousal relationships: r.1.15A(4). While it is not appropriate to consider whether the parties are spouses at the time of application or time of decision, an investigation of the parties' intentions with regard to the definition of spouse in legislation may assist in determining the parties' aspirations.

14. Financial aspects of the relationship

15. The Tribunal must consider all the financial aspects of the relationship including any joint ownership of real estate or other major assets; any joint liabilities; the extent of any pooling of financial resources (especially in relation to major financial commitments); whether either person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of day to day household expenses.
16. The review applicant currently works part time as a nail technician and the visa applicant installs signage for shops and also makes curtains. The indication at hearing is that the parties' income is relatively modest and sufficient to cover their individual household, personal and family needs. The parties have had three holidays together since their engagement party and the first of these, which included a trip to China, was funded by a payout from the visa applicant's previous employer, a Bank. The expenses were shared for the other two holidays with the visa applicant covering daily expenses for them both. The visa applicant expressed his wish at hearing, to be fully employed so that he can provide for her.
17. The Tribunal has regard to the evidence before it and gives particular attention to the submissions at hearing (as per the audio recording). There is no indication that the parties currently share the financial aspects of their relationship whilst indicating the intent to do so.
18. Accordingly, the Tribunal gives little weight to this aspect.

19. Nature of the household

20. In assessing the nature of the household, the Tribunal gives weight to evidence of joint responsibility or shared responsibility for housework and chores, for the care and support of any children (where relevant), and the living arrangements of the parties.
21. The parties live apart in separate countries, with the review applicant returning to Vietnam to visit and spend time with the applicant on holidays. As such, they independently manage and organise their own households. The review applicant's daughter spoke of the concern shown by the applicant for her mother, his conversations with her about it, with requests for her to assist her mother with the care for her younger, boisterous brother.

22. The parties have indicated consistent communications about extended family concerns and the Tribunal considered and found the applicant's support to the review applicant, upon the passing of her father, to be compelling. When Ms Tran advised him of her father's admission to hospital in Vietnam (where she had travelled to visit), he immediately attended and provided constant care and support for her during her father's illness, and after his passing. He also sought the support of his niece who is studying in Melbourne on a student visa, to visit, help and support the applicant.
23. The Tribunal has given particular regard to the extended care and support the parties provide their respective families, whilst living in separate homes and accords significant weight to nature of the household.
24. In assessing the nature of the household, the Tribunal gives weight to evidence of joint responsibility or shared responsibility for housework and chores, for the care and support of any children (where relevant), and the living arrangements of the parties.

25. *Social aspects of the relationship*

26. In assessing the social aspects of a relationship, the Tribunal must have regard to all the social circumstances of the relationship including whether the parties represent themselves as being in a de facto relationship with each other; the opinion of the parties' friends and acquaintances about the nature of the relationship and any basis on which the parties plan and undertake joint social activities.
27. The parties have both been previously married, have children and are 37 and 42 years of age respectively. The maturity demonstrated in the way in which they provide each other support, notwithstanding distance, is apparent. Most of the extended family of both parties live in Vietnam, and photos submitted show gatherings with a diverse number of people, including family. The Tribunal finds the photos submitted showing the commemorative service and viewing of the applicant's father, particularly persuasive. The parties share their holidays and credible and consistent evidence was provided at hearing that indicates the shared way in which these holidays are planned.
28. The review applicant's daughter and the applicant's niece appeared as witness at hearing, giving evidence about the nature of the parties' relationship.
29. The Tribunal has regard to the social aspects of the relationship, the opinion of their families, friends and acquaintances as to whether they are in a relationship and has considered the credible and consistent testimony submitted at hearing. Accordingly the Tribunal accords significant weight to the social aspects of the relationship.

30. *The nature of the person's commitment to each other*

31. In assessing commitment to each other, the Tribunal must have regard to the duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the parties draw from each other and whether the persons see the relationship as a long term one.
32. The parties were first introduced by a mutual friend and communicated by telephone before meeting two months later. They were engaged in a local and traditional event in February 2014, and have remained in constant contact since. Phone records, movement records, boarding passes, accommodation receipts and other travel documentation were submitted that indicates a long term commitment to each other. The Tribunal considered the honest and candid manner in which Ms Tran provided her evidence, and statements of fact that were verified by her daughter and the applicant. (as per the audio recording).

33. The Tribunal has given regard to all the submissions and accords significant weight to the nature of the person's commitment to each other.
34. Having regard to the considerations for a spousal relationship, and the degree to which these factors may be applied to determine a future intention, the Tribunal is satisfied that the requirements of section 5f are met, in so much as they have demonstrated a mutual commitment to a shared life and a genuine and continuing relationship, both at time of application and decision.
35. On the basis of the above the Tribunal is satisfied that at the time of the visa application the parties genuinely intended to live together as spouses, and therefore cl.300.216 is met.

36. Do the parties continue to meet time of application requirements?

37. Clause 300.221 requires that at the time of decision, the visa applicant continues to satisfy the criteria in cl.300.211, 300.214, 300.215 and 300.216. That is, that visa applicant intends to marry an Australian citizen, permanent resident or eligible New Zealand citizen; that the parties have met and are known to each other personally; that the parties genuinely intend to marry and intend to do so during the visa period; and that the parties genuinely intend to live together as spouses.
38. The Tribunal finds that the review applicant continues to be an Australian citizen at the time of the decision, and is satisfied that the visa applicant intended to marry an Australian citizen; that the visa and review applicant have met and are known to each other personally; that they genuinely intend to marry and intend to do so during the visa period; and that they genuinely intend to live together as spouses. The applicant continues to satisfy 300.211, 300.214, 300.215, and 300.216 at time of decision. Accordingly, cl.300.221 is met.
39. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 300 visa.

DECISION

40. The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa:
- cl.300.215 of Schedule 2 to the Regulations
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Helen Kroger
Member